and the applicable standard of review (Pet. App. at 35a, R. 36, JA 27), reported at 255 F. Supp. 2d 744 (W.D. Mich. 2003).

6. Judge Bell entered an Opinion and Order on *October 22, 2003*, enforcing the Arbitration Award in favor of Respondent (Pet. App. at 49a, R. 59, JA 40), unreported.

7. The United States Court of Appeals for the Sixth Circuit rendered a decision upholding the District Court's enforcement on *March 18, 2005*, which decision is published at 401 F.3d 701 (6th Cir. 2005) (Pet. App. at 3a). Rehearing was denied in an unpublished decision entered on *May 27, 2005* (Pet. App. at 1a).

RELEVANT STATUTES AND TREATIES

IMS accepts the statement of relevant statutes and treaties offered by Petitioner but further provides the Court with Section 10 of the FAA, which establishes the standard for the vacation of an arbitration award as follows:

> **(a)** In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> > **(1)** where the award was procured by corruption, fraud, or undue means;
> >
> > **(2)** where there was evident partiality or corruption in the arbitrators, or either of them;
> >
> > **(3)** where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10.

STATEMENT OF THE CASE

On or about May 2, 1997, IMS and CST (later renamed Jacada but referred to herein as "CST") entered into a Distribution Agreement (hereinafter, "Agreement") (R. 28, JA 96). Pursuant to that Agreement, IMS was given the exclusive right to market and distribute the Jacada/400 product in the Territory defined **as Europe, the Middle East, and Africa** (not the United States). IMS spent over one year marketing the Jacada and Jacada Gold products to a company called JBA International, Inc. ("JBA"), a European company (now GEAC). On February 27, 1999, JBA purchased the Jacada and Jacada Gold products for approximately $7,000,000. In addition to purchasing the Jacada and Jacada Gold products, JBA also purchased the right to re-sell those products, contrary to IMS' exclusive distribution rights under the Agreement. IMS's efforts were fruitful yet CST refused to compensate IMS under the Agreement.

IMS initiated arbitration proceedings in Michigan pursuant to the Agreement (R. 28, JA 96). In November of 2000, the parties participated in a week long arbitration proceeding before a panel of three attorneys who specialize in technology related legal issues. During the hearing, IMS presented six witnesses – five personally present and the sixth testified telephonically from Kuala Lumpur. CST presented one live witness and one telephonically from England. The parties submitted a total of approximately 237 exhibits. The parties had taken depositions in England (2) and in Atlanta, Georgia.

The arbitration panel issued its award on April 3, 2001, which was favorable to IMS (Pet. App. at 66a, R. 45, JA 91). As part of the award, the panel determined as follows:

a. IMS was the procuring cause of the sale of the Jacada product to JBA (R. 28, Arbitration Award, p. 2; JA 92).

b. 50% of the license fee paid by a customer would go to CST and 50% to IMS (R. 28, Arbitration Award, p. 3; JA 93).

c. The limitation of damages clause is unreasonable, unconscionable, and fails of its essential purpose (R. 28, Arbitration Award, p. 3; JA 93).

The arbitrators awarded IMS an initial payment from CST of $401,299 to be paid within 30 days of the date of the award, which was 50% of the payments that CST had already received from JBA, less $1,110,000 in expenses incurred by CST during due diligence. IMS was further awarded 50% of nine remaining payments from JBA to CST in the amount of 208,333 pounds sterling for each payment through February 1, 2003 (R. 28, Ex. 13, Arbitration Award, p 4, JA 94).

On April 24, 2001, IMS moved to enforce the arbitration award in the United States District Court for the Western District of Michigan and CST sought to have the award vacated in an action in the Oakland County Circuit Court. In addition to asserting federal district court jurisdiction premised on Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 203 and the Convention, IMS' Application expressly includes statements that IMS is an entity organized under the laws of the State of Michigan and CST is an English company. Further, that Application seeks enforcement of an arbitration award amounting to approximately 25 times the federal court's jurisdictional limit.

On November 28, 2001, the Oakland County Circuit Court held that the award was non-domestic and the Convention applied. IMS then had the state court action transferred to

Kalamazoo, Michigan (R. 28, paragraph 11(g), JA 103), then removed to the United States District Court for the Western District of Michigan pursuant to 9 U.S.C. § 205. Once the state court action was removed, the United States District Court for the Western District of Michigan consolidated the two actions and lifted the stay of the proceeding that was originally imposed by the District Court.

The District Court entered an Order on March 31, 2003 establishing the applicable standard of review (R. 36, JA 27). The District Court confirmed that the arbitration award falls under the Convention as a non-domestic award, but also held that the standard of review applicable under Chapter 1 of the Federal Arbitration Act applied by virtue of Article V(1)(e) of the Convention. The district court's standard of review decision cited cases from five different federal circuits supporting the application of the Convention. Regarding CST's urging to disregard these cases, the district court stated as follows:

> Jacada contends that *Bergesen* was wrongly decided and should not be followed by this Court. Jacada's contention is *not supported by any case law* and does not provide a convincing basis for ignoring the opinions of *all* of the circuit courts that have considered the issue. (R. 36, Opinion dated March 31, 2002, p 8; JA 35). *Emphasis added.*

On October 22, 2003, the District Court rendered its decision regarding the enforceability of the arbitration award under the Convention and Chapter 1 of the Federal Arbitration Act, 9 U.S.C. § 101 *et seq.*, stating in relevant part as follows:

> The Court is satisfied that the arbitrators' award does in fact "draw its essence" from the contract. . . . Although the arbitrators' explicitly disregarded the limitation of damages provision, this is not a case where the arbitrators simply redrafted the Agreement according to their own sense of fairness. It is evident from a review of the arbitrators' award that they disregarded the limitation of damages provision in

order to give effect to IMS' exclusive distribution rights and duties under the Agreement. The arbitrators found that IMS was the procuring cause of the sale to JBA and that IMS would likely have completed the sale to JBA had CST not asked IMS to step aside. (Arb. Award at 2). That finding is not being challenged by CST. Had the arbitrators applied the limitation of damages provision to a breach of the exclusivity provision, IMS would receive no consideration for undertaking its contractual obligation . . . and it would have no remedy if CST jumped in at the last minute, as it did here, to take the contract from IMS.

There was also evidence in the record from which the Arbitrators could find that the limitation provision was intended to apply to failures of the Product to conform to its intended purpose, rather than to a breach of the exclusivity provision. (Roark-Peters testimony, Arb. Tr. Vo. I at 128-129). . . . CST introduced no contradictory evidence regarding the intent of the parties.

In ignoring the limitation of damages clause the arbitrators were clearly attempting to give effect to the essential terms of the contract and the intent of the parties. Accordingly, the Court is satisfied that their disregard of the limitation of damages provision drew its essence from the contract. (District Court' Opinion of October 21, 2003, pp 8-9).

On March 18, 2005, the United States Circuit Court for the Sixth Circuit rendered its decision confirming the application of the Convention and upholding the Award. **Not one of the judges of the Sixth Circuit disagreed with the application of the Convention.** Now, more than four years after the Award was rendered, and two separate courts have ruled to enforce the award, CST continues to fight its enforcement without legal authority or even a sound basis for an extension of the law.

REASONS FOR DENYING THE PETITION

Summary of the Argument

The issues raised by CST are not novel legal issues, nor are they issues regarding which the federal courts are split. The implicated Convention and statutory language have been consistently interpreted and applied across the circuits. CST's attempts to raise artificial concern about the purportedly expanding scope of federal jurisdiction is misplaced. This action involves foreign commerce and implicates this Country's adherence and commitment to an international treaty to which it has become a party.

The Award is not a domestic award but rather , involves foreign parties, a contract signed abroad, an exclusive distribution territory that was entirely outside of the United States, and a breach abroad. The Convention applies. The district court appropriately refused to apply the standard for the review of arbitral awards established by the state of Michigan. The state trial court confirmed the application of the Convention. The parties did not agree that Michigan's standard for the review of arbitral awards would apply, and the FAA preempts state law on this issue regardless.

The Arbitration Award was well grounded in fact and law. The panel of arbitrators, after a full and fair hearing on the matter, confirmed that IMS was entitled to recover damages for the breach that CST does not dispute. Reading the Agreement as a whole, and giving affect to the intent of the parties as established during the arbitral proceedings, IMS is entitled to collect its benefit of the bargain under the Agreement.

I. The Circuit Court Appropriately Established Subject Matter Jurisdiction

CST would like this Court to deny federal subject matter jurisdiction in the enforcement of an arbitration award rendered between a U.S. company and a British company regarding an Agreement entered into in Great Britain, with a distribution

territory of Europe, Africa and the Middle East, which was breached in Europe by CST's failure to pay for IMS' sale of the CST product to another British company, JBA. Regardless of the application of the Convention however, the District Court had subject matter jurisdiction under 28 U.S.C. § 1332 (diversity jurisdiction).

The legislative history, the language of the Convention, the language of the implementing legislation, and every single federal appellate court decision addressing the issue raised by Petitioner support the finding of the Michigan trial court, the District Court and the Court of Appeals. The parties' contract and this dispute involved "foreign commerce." The language of the Award CST relies upon to suggest the arbitrators determined the Award was not domestic merely established venue under the Convention, it did not address domesticity or whether the Convention applies. To the contrary, its inclusion in the Arbitration Award is indicative of the arbitrators' perception that the Convention was applicable.

All of the following facts support the decisions below:

(a) The Distribution Agreement was between CST, an English company, and IMS, a Michigan corporation.

(b) The Agreement was executed in Europe.

(c) The "Territory" under exclusive distribution rights of the Agreement was Europe, the Middle East, and Africa (not the United States).

(d) Performance under the Agreement took place abroad.

(e) The breach took place abroad.

(f) The sale that led to this dispute was to a European company, JBA.

A. Convention Language and Precedent

The language of the Convention, the language of the implementing legislation, 9 U.S.C. § 201 *et seq.*, and all of the federal circuit courts that have rendered a decision on the application of the Convention support only one conclusion, that the Convention applies to this action.

Citing *Bergesen v Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983), Judge Bell stated as follows:

> . . . the second sentence of Article I(1), as supplemented by 9 U.S.C. § 202, applies to those arbitral awards made in the United States which arise from a commercial relationship with some significant foreign nexus. *Coutinho Caro*, 2000 U.S. Dist. LEXIS 8498, 2000 WL 435566 at *4.

Bergesen's broad interpretation of the scope of the Convention has been widely followed.

The relevant portions of Article I of the Convention read as follows:

> Section 1. This Convention shall apply to. . . . *It shall also apply to arbitral awards not considered domestic awards in the State where their recognition and enforcement are sought.* Emphasis added.
>
> Section 3. When signing, ratifying or acceding to this Convention . . . *any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.* It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Consequently, Section 3 of Article I of the Convention permits signatory states, such as the United States, to implement their

own declaration on two issues of potentially limiting the application of the Convention: (1) that it will only apply if the award is rendered in another state; and/or (2) it will only apply to legal relationships that are commercial under U.S. law.

The Legislature's decision on these two issues is reflected in the U.S. implementing legislation of the Convention found in Chapter 2 of the FAA (9 U.S.C. § 201 *et seq.*). That language is clear, indisputable, and dispositive of this action. The Legislature chose NOT to implement the first limitation but to implement the second limitation proposed by Section 3 Article I of the Convention.

Specifically, 9 U.S.C. § 202 provides:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, *which is considered as commercial*, . . . , falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless *that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states*. (Emphasis added).

As is obvious from the express language of Section 202 of Title 9, the Legislature chose to enact the limitation that the relationship be commercial. It chose NOT to enact the limitation that the arbitration award not be rendered in the United States in order to fall under the Convention. CST's argument is directly contradicted by the actions of the Legislature in implementing the Convention.

CST also suggests that the language of 9 U.S.C. § 202 that reads:

> the relationship involves property located abroad, envisages performance or enforcement abroad, or

> has some other reasonable relation with one or more foreign states

applies only to actions where both parties are U.S. citizens. Such an interpretation defies logic and is a strained extrapolation of the language of § 202. An award is not *less* domestic because both of the parties are U.S. citizens.

CST cites to the legislative commentary purporting to acknowledge the continued application of Chapter 1 of the FAA to "interstate commerce" (Appellant's Proof Brief, p 22-23). It cannot be disputed that the Agreement here did not involve local or even interstate commerce. Rather, it involved commerce in three geographical regions, Europe, the Middle East and Africa. This is foreign commerce. CST's citation of Mr. Kearny's commentary only supports IMS' position. Mr. Kearny stated, "the implementation of the Convention should be concerned only with **foreign commerce**" (emphasis added).

The United States Supreme Court acknowledged the purpose of this country's adoption of the Convention to "encourage recognition and enforcement of commercial arbitration agreements in *international contracts* and to unify standards by which agreements to arbitrate are observed and arbitral awards are enforced in signatory countries.[2] The Agreement under scrutiny in this action can only be considered an 'international contract'. Every federal circuit court that has addressed the issue of the interpretation of "domestic" under Chapter 2 of the FAA has supported the application of the Convention in this instance. This case does not warrant *certiorari*.

First, in 1982, the United States Circuit Court for the First Circuit rendered its decision in *Ledee v Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982). The First Circuit set forth a test, as

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2. *Scherk v Alberto-Culver Co.*, 417 U.S. 506, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974), *reh den.*, 419 U.S. 885 (emphasis added).

follows, to determine whether an award falls under the Convention:

(1) Is there an agreement in writing to arbitrate the subject of the dispute? Convention, Articles (II)(1), II(2).

(2) Does the agreement provide for arbitration in the territory of a signatory of the Convention? Convention, Article I(1), I(3); 9 U.S.C. § 206; *additional citations omitted.*

(3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial? Convention, Article I(3); 9 U.S.C. § 202.

(4) Is a party to the agreement not an American citizen, *or* does the commercial relationship have some reasonable relation with one or more foreign states?[3]

If the answer is yes to each of these questions, the dispute falls under the Convention. In the present action, the answer to all of the above is YES. In *Ledee, supra*, the defendant was a citizen of Italy that made and marketed ceramic tiles. The plaintiffs were Puerto Rican citizens. The action was brought in the United States District Court for the District of Puerto Rico. The parties had entered into a distributorship agreement whereby the plaintiff would be the exclusive distributor of the defendant's ceramic tiles in the Antilles. Consequently, like in the present action, one of the parties was local and one of the parties was foreign. The contract between the parties envisaged performance abroad. The 1st Circuit in *Ledee*, determined that the action was not domestic and therefore, was governed by the Convention.

The 2nd Circuit addressed the application of the Convention in 1983 in the case of *Bergesen v Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983). The court stated:

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3. 9 U.S.C. § 202. *Ledee, supra* at 186-87.

> The Convention did not define nondomestic awards. The definition appears to have been left out deliberately in order to cover as wide a variety of enforcing authority to supply its own definition of "nondomestic" in conformity with its own national law.

Id. at 932. *Bergesen* involved an arbitration award rendered in the United States between two foreign entities. The Second Circuit expressly emphasized the narrow interpretation of the term 'domestic' such that the international nature of a contract will assure the enforcement of any applicable arbitration provision under the Convention. That court confirmed the non-domestic nature of the dispute and applied the Convention.

In 1989, the United States Circuit Court for the Ninth Circuit addressed the issue of the domesticity of an arbitration award in *Ministry of Defense of the Islamic Republic of Iran v Gould Inc.*, 887 F.2d 1357 (9th Cir. 1989). The Ninth Circuit held that the Convention applies when the arbitral award:

> (1) arises out of a legal relationship (2) which is commercial in nature and (3) which is not entirely domestic in scope", and that the award at issue was "obviously not domestic in nature because Iran [was] one of the parties to the agreement."

Id. at 1362.

In 1995, the Seventh Circuit similarly interpreted § 202 to include "any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, . . ." *Jain v de Mere*, 51 F.3d 686, 689 (7th Cir.), *cert. den.*, 116 S. Ct. 300 (1995). *Jain, supra*, involved a commercial dispute between two foreign entities. While in the present action IMS is not a foreign entity, the division of IMS with which CST dealt under the Agreement was IMS-Europe. CST is a European company founded in Israel.

The Agreement clearly contemplated and involved an international relationship and business conducted in foreign commerce.

Next, in 1995, the United States District Court for the Eleventh District rendered its decision in *Industrial Risk v M.A.N.*, 141 F.3d 1434 (11th Cir. 1998), holding that an arbitral award issued by an arbitral panel sitting in the United States and applying American federal or state law *still* may fall under the Convention. The court stated:

> The purpose of the New York Convention, and of the United States' accession to the convention, is to 'encourage the recognition and enforcement of international arbitral awards,' *Bergensen* at 932, to 'relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that [is] speedier and less costly than litigation.'[4]
>
> . . . an arbitral award made in the United States, under American law, falls within the purview of the New York Convention– and is thus governed by Chapter 2 of the FAA– when one of the parties to the arbitration is domiciled or has its principal place of business outside the United States.

Id. at 1441.

In *Lander Company, Inc. v MMP Investments, Inc.*, 107 F.3d 476 (7th Cir. 1997), the Seventh Circuit considered the applicability of the Convention where the commercial contract involved two U.S. companies. The contract called for the distribution *abroad* by MMP Investments, Inc. of shampoo and other products manufactured by Lander in the United States. The Seventh Circuit held that simply because an award was rendered in the United States does not make that award 'domestic', even if both parties are American companies. Where

4. *Ultracashmere House, Ltd. v Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981). *Industrial Risk, supra* at 1440.

both companies were American but the contract called for distribution abroad, the Seventh Circuit held that the arbitration award fell under the Convention and Chapter 2 of the FAA. In *Lander*, the award was rendered in the United States, the product was produced in the United States, AND both parties were American companies. *Nevertheless, the award still fell under the Convention as the performance of the contract was to take place abroad.* It involved "foreign commerce".

All of the appellate court decisions interpreting the application of the Convention in the context of an allegedly "domestic" award, as well as the language of the Convention and 9 U.S.C. § 202, the state court, the District Court, and the Circuit Court's, determinations that the present action falls under the Convention were correct. *Certiorari* in this action is unsupported.

In support of its position, CST cites the Restatement (Second) of Conflicts of Law § 220, comment c (1971). The court in *Lander*, *supra*, expressly rejected the narrow interpretation of the language in the Restatement and decided instead to rely upon the broad and encompassing language of Section 202 of the Federal Arbitration Act to provide a more appropriate definition of 'domestic' awards. The United States and Congress have a clear interest in preserving the relationship of the U.S. with the other signatory countries. The states, on the other hand, do not have a similar interest. Because CST is the foreign party and it is CST asking the Court to disregard the application of the Convention, it may seem less offensive to disregard the interests of the United States and the federal courts in enforcing this international arbitral award. Imagine the offense to U.S. relationships in foreign commerce were the U.S. to refuse to apply the Convention where a foreign party sought enforcement, simply because the arbitral award was rendered in the United States and applied the laws of one of its states.[5]

5. Sweden, a country that is frequently chosen as a neutral site for international arbitration, were it to adopt the holding CST advocates, would seldom enforce an arbitration agreement under the Convention.

CST also argues that some of the federal circuit court cases cited above are not instructive because they involved actions to compel arbitration under the Convention as opposed to actions under the Convention to enforce an arbitration award already rendered, as is the case in the present action.[6] Neither the Convention language nor Chapter 2 of the FAA provides a different definition for what agreements fall under the Convention for actions to compel arbitration and actions to enforce an award. In fact, were we to accept CST's reasoning that the award is domestic because it was rendered in Michigan, a federal district court could exercise its jurisdiction under the Convention to compel arbitration but then refuse to exercise that same jurisdiction to enforce an award that was rendered.

CST urges the overruling of the holding in *Bergesen*, *supra*, suggesting that hard cases make bad law. Unfortunately for CST, the present action is not a "hard" case. This dispute clearly involves foreign commerce. Similarly, the 'hard case' theory is not persuasive in light of the numerous other federal circuits that have followed the line of reasoning in *Bergesen*. Each could have chosen to narrow the application of the Convention. Understanding the import and purpose behind the implementation of the Convention, each appropriately stood true to the Legislature's intention that it be broadly applied, which intention is evidenced by the language of Chapter 2 of the FAA. Looking to the commentary preceding the enactment of Chapter 2, the discussion is clear that agreements involving "foreign commerce" were to be governed by the Convention.

CST warns of some dangerous and ominous shift of power between the state and federal judicial systems. The brevity of attention CST gives this argument is indicative of its strength. Clearly the federal judicial system has much more of a stake in applying the Convention to an action that does not involve local

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6. While CST argues *Bergesen* is the only decision this Court must ignore or overrule in order to find in its favor, in fact, all of the circuit court decisions cited herein must be overruled in order to rule in CST's favor.

commerce but rather, foreign commerce in the form of an Agreement signed abroad, performed abroad (as contemplated), and breached abroad. It is ridiculous to claim the state of Michigan has a greater stake in this matter than the United States.

9 U.S.C. § 208 reads, "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States". Absolutely no *violence* has been done to the local law, particularly where the district court applied Article V, Section 1(e) to impose the standard of review found under Chapter 1 of the FAA, and particularly where the state court similarly held that the Convention applies.

B. Alternative Basis for Federal Subject Matter Jurisdiction

Even if the Convention does not apply, which it does, the District Court still had subject matter jurisdiction. CST's position that the action must be remanded because, if the Convention does not apply, the District Court did not have subject matter jurisdiction is not supported by the law CST cites.

The District Court did not rely only upon the removed action for subject matter jurisdiction. The original Application to Enforce Arbitration Award similarly established subject matter jurisdiction. The facts as pled, and conceded by CST, confirm that CST is not a Michigan citizen and the arbitration award in controversy is valued at $401,299.00 plus fifty percent of nine remaining payments of 208,333 pounds sterling. See paragraphs 1, 2 and 7 of the Application to Enforce the Arbitration Award. The facts alleged were sufficient to confer diversity jurisdiction in the district court. 29 U.S.C. § 1332.

II. The FAA Preempts State Law As To The Standard Of Review Of An International Arbitration Award

The district court's determination that the FAA preempts Michigan law is well supported by applicable law. The cases of *Roadway Package System, Inc. v Kayswer*, 257 F.3d 287 (2001) and *Action Industries, Inc. v Unites States Fidelity & Guarantee Corporation*, 358 F.3d 337 (2004), are two cases that address the same issue presented here. In those cases, the Third Circuit and Fifth Circuit both held that parties have the ability to contractually opt out of the standard of review established by the FAA but that a generic choice-of-law provision is insufficient to support a finding that contracting parties actually intended to opt out of the FAA's "default regime" of review. *Roadway Package System*, at 288-89. In the federal action, the court does not really even have to get to the question of preemption as the contract itself does not evidence an intent that Michigan law will apply as it relates to the standard of review of the arbitration award.

However, even if this Court were to look to the state court for guidance on the standard of review, the state court, on Petitioner's Complaint to Vacate the Arbitration Award, has specifically ruled that the Convention applies. Therefore, even if state law prevails, the state has chosen to apply the Convention, which review provisions are even narrower.

Another useful case on this issue is *Ferro Corporation v Garrison Industries, Inc.*, 142 F.3d 926 (6th Cir. 1998). In *Ferro*, the Sixth Circuit Court of Appeals reversed the decision of the district court,[7] determining that, despite the choice-of-law language, there was no indication that the parties intended to incorporate Ohio law regarding whether the issue of fraudulent inducement would be adjudicated in a judicial forum rather than

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7. The district court relied upon *Volt Information Sciences, Inc. v Board of Trustees of Leland Standford Junior Univ.*, 489 U.S. 468, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989) and *Public Service Credit Union v Ernest*, 988 F.2d 727 (6th Cir. 1989)

by the arbitrators. *Ferro Corporation, supra* at 937. Specifically, the Sixth Circuit inquired as to whether the application of state law under the circumstances would conflict with the application of federal law, as that was the fundamental inquiry in *Volt, supra*. *Ferro, supra* at 934-35. In addition, this Court in *Volt, supra*, did not interpret the contract itself but relied upon the interpretation given by the California court. *See Mastrobuono v Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 1217 n.4, 131 L. Ed. 2d 76 (1995). In *Mastrobuono, supra*, the Court was reviewing the contract interpretation given by a federal district court, as is the case in the present action. **In the present action, even were this Court of Appeals constrained by the contract interpretation of the state court, that interpretation would apply the Convention, not state law.** The Oakland County Circuit Court already ruled that the Convention applies. In *Doctor's Associates, Inc. v Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 901 (1996), *Volt, supra* was further limited when this Court applied the FAA to preempt a Montana statute imposing notice requirements on the enforceability of an arbitration agreement.

As stated in *Mastrobuono, supra*, "the choice-of-law provision covers the rights and duties of the parties . . ." *Mastrobuono, supra* at 1219. Therefore, for all of the following reasons, as to the standard of review, the FAA preempts the application of Michigan's standard of review of arbitration awards:

(a) The application of state law would conflict with the FAA because clearly each body of law imposes a different standard of review (see *Ferro, supra* at 934-935 and *Volt, supra* at 476 n.5);

(b) This Court is reviewing decisions of the federal district court's interpretation of the Agreement and the Oakland County Circuit Court's interpretation

of the Agreement, both of which held the Convention applies;[8]

(c) As acknowledged by the district court's decision, the choice-of-law provision is a broad provision that does not purport to limit or restrict the standard of review applied to the arbitration award but rather, is only intended to govern the rights and obligations of the parties under the Agreement. See *Mastrobuono, supra* at 1219; and

(d) Application of the Michigan standard of review would undermine the policies of the FAA by failing to give the appropriate level of deference to decisions rendered by duly authorized arbitration panels.

It is improper for CST to attempt to persuade this Court to hear a case as a result of alleged disparity among the circuits when the cases CST relies upon do not hold what CST represents they hold. CST relies upon the case of *Public Service Credit Union, supra*, however, that case is not instructive because the parties stipulated to the application of the state arbitration statute and the Sixth Circuit was not required to address the issue at all.[9] The Sixth Circuit Court stated, "[s]ince both parties agreed that the Michigan statute controlled their agreement, federal law was simply not applicable to this case." *Id.* CST's brief suggests that the state law provision rendered the FAA inapplicable. There was absolutely no such holding by the court. The only other two cases CST cites in this regard are *Ekstrom v Value Health, Inc.*, 68 F.3d 1391 (1995) and *ASW Allstate Painting & Construction Co., Inc. v Lexington Insurance Company*, 188 F.3d 307 (1999). These to cases provide no support for CST's position. Though both were decided after *Mastrobuono, supra*, neither circuit cited this Court's precedent in *Mastrobuono*,

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8. *See YusufAhmed Alghanim & Sons, W.L.L. v Toys "R" Us, Inc.*, 126 F.3d 15, 21 (2d Cir. 1997).

9. *Public Service Credit Union, supra* at 629.

supra. Furthermore, in *ASW Allstate Painting & Construction Co., Inc., supra*, the Fifth Circuit held that the Texas law there in question did not conflict with the FAA. In the present action, there is no dispute that the standard of review under Michigan law would conflict with the standard established by the FAA.

It is clear, from the language of the FAA, that it applies to all agreements evidencing transactions involving commerce. 9 U.S.C. § 2. In *Appalachian Regional Healthcare Inc. v Beyt, Rish, Robbins Group, Architects*, Docket No. 91-6063, May 19, 1992 (6th Cir.), unpublished, the Sixth Circuit Court of Appeals similarly reviewed the continuing breadth of *Volt*, and its application to the question of whether the FAA applies regardless of the existence of a state choice-of-law provision. The Sixth Circuit confirmed that *Volt, supra* does not require disregard of the FAA simply because of the existence of a choice-of-law provision selecting state law. The court held:

> We find that the district court need not have addressed the abstention issue because under the Federal Arbitration Act, the arbitration award was subject to a limited scope of review and the only question before the district court was whether the arbitrators overstepped their authority in rendering the award.

Id. at 6-7.

The Sixth Circuit Court cited several federal decisions in support of its application of the FAA in the face of a state choice-of-law provision.[10] For all of these reasons, the district court's decision not to apply the Michigan standard of review for the enforcement of arbitration awards was supported by case law as well as the FAA.

Petitioner points to the choice-of-law provision selecting Michigan law to argue that the standard for reviewing arbitration

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10. *Todd Shipyards Corp. v Cunard Line, Ltd.*, 934 F.2d 1056, 1062 (9th Cir. 1991), *Painwebber Inc. v Hartmann*, 921 F.2d 507, 510 (3d Cir. 1990), *Ackerberg v Johnson*, 892 F.2d 1328, 1333-34 (8th Cir. 1989), additional citations omitted.

awards established under Michigan law should have been applied. However, standard choice of law provisions address horizontal choice of law, not vertical choice of law. In other words, the reason parties insert a choice of law provision is to assure that the laws of a different state within the United States do not apply rather than to prevent the application of federal law. For example, in the case of *DeCaminada v Coopers & Lybrand, L.L.P.*, 232 Mich. App. 492; 591 N.W. 2d 364 (1998), the Michigan Court of Appeals confirmed that where the FAA applies, it preempts state law. In that case, the Michigan Court of appeals applied the FAA even in the face of a New York choice of law provision. The court stated:

> State courts are bound, under the Supremacy Clause, US Const. art VI, cl 2, to enforce the FAA's substantive provisions. *Kauffman v Chicago Corp.*, 187 Mich App 284, 286; 466 NW 2d 726 (1991).
>
> . . . application of the FAA implicates the Supremacy Clause, which precludes us from applying our state constitution or laws to defeat federal legislation. *Id.* at 501-02, citing US Const. art VI, cl 2.

Petitioner's argument that the standard of review under the FAA should not have been applied is unsupportable and this Court should deny the Petition for Writ of Certiorari.

III. The Arbitration Award Must Be Upheld

This award must be enforced in its entirety because it was rendered after a thorough and lengthy arbitration decision and by a panel of three lawyers specializing in computer software matters. The hearing lasted five days. The arbitrators closely observed the witnesses, their demeanor and the facts and evidence presented at the hearing. Their decision was well reasoned, consistent with the Agreement, the parties' intentions under the Agreement, and Michigan law. CST breached the Agreement by refusing to pay IMS for the sale of the Jacada product to JBA, which sale was procured by IMS. CST also breached the Agreement by violating the exclusive distribution rights granted to IMS in the Agreement. As a result of this breach,

IMS suffered damages as clearly and appropriately reflected in the decision of the arbitrators.

The fundamental role of contract interpretation is to give effect and meaning to the parties' intentions when they entered into the contract.[11] A contract must be read as a whole and meaning must be given to each provision.[12] Courts must adopt interpretations that will result in a reasonable and just contract.[13]

As stated in paragraph 1(a) of the Agreement:

> **So long as IMS has the EXCLUSIVE RIGHT to Direct Market JACADA/400, CST hereby retains no rights to Direct Market JACADA/400 in the Territory during the term of this Agreement (Ex. 1).**

Paragraph 10 of the Agreement contains a limitation of liability provision, purporting to limit the recovery for a breach to amounts IMS paid to CST under the Agreement.[14] In order to give the exclusive right to direct market granted to IMS any meaning or effect, and when reading the contract as a whole, that limitation provision cannot be applied to a breach of the exclusive distribution rights granted by the Agreement. Such an interpretation would give the exclusive distribution right no

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11. *Terry Barr Sales v All-Lock Co.*, 96 F.3d 174 (6th Cir. 1996); *SSC Associates Ltd Partnership v General Retirement Systems*, 210 Mich. App. 449, 534 N.W. 2d 160 (1995).

12. *National Enters v Smith*, 913 F. Supp. 534 (E.D. Mich. 1996) *vacated and remanded on other grounds*, 114 F.3d 561 (6th Cir. 1997).

13. *Wembelton Dev. Co. v Travelers Ins. Co.* 45 Mich. App. 168, 206 N.W. 2d 222 (1973)

14. The administration of the Agreement was such that IMS would market the product, locate a purchaser, buy the product from CST, then re-sell to the purchaser with a mark-up. The purpose of the limitation of damages provision was to assure that, in the event the product was defective and the purchaser rejected, IMS would, in that case, be limited to recover from CST only the amount IMS had paid CST to purchase the product (or license keys).

effect, meaning or purpose and consideration for the Agreement itself would fail.

Because the goal is to harmonize the contract as a whole by giving effect to each contractual clause,[15] the arbitrators appropriately did not apply the limitation of liability provision to the exclusive distribution rights created under the Agreement. Were the arbitrators to have given the Agreement the reading proposed by CST, CST could violate the exclusive distribution rights granted to IMS the day after the execution of the Agreement and IMS would have no recourse, giving that provision no meaning. Or, reading the Agreement as suggested by CST, CST could permit IMS to market the product, evangelize to the computer industry about the product and line up a whole host of sales, only to have CST step between IMS and the purchaser and, again, IMS would have no remedy. This is exactly what happened in the instant situation and the arbitrators appropriately determined that the limitation provision could not be applied to CST's breach of IMS' exclusive distribution rights.

The only witnesses who testified as to the intent and meaning of the limitation of damages provision were Mr. Shearing and Mrs. Roark Peters (both on behalf of IMS). They testified that that provision was not intended by the parties to apply to a circumstance in which CST breached the exclusive right of IMS to distribute the Jacada product. As explained, were the limitation provision given effect in this circumstance, there would have been no consideration given in exchange for IMS' promise to use its best efforts to market and distribute the Jacada/400 product. This distinction is critical, that being the difference between limiting a remedy and prohibiting any remedy at all.[16]

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15. *National Enters v Smith, supra.*

16. Presuming the limitation provision were enforced, the Agreement would be voidable for lack of consideration and Michigan's procuring cause doctrine supports the award.

Mr. Frank Coggrave signed the Agreement on behalf of CST and could have testified as to CST's intent. CST did not call him as a witness. CST's counsel who was involved in the drafting of the contract (Ms. Roark Peters' counterpart) was listed as a witness by CST but never called to testify. Michigan Standard Jury Instruction 6.01 provides that where CST fails to offer someone as a witness, the fact finder may infer that the evidence would have been adverse to CST. CST's failure to offer either Mr. Coggrave or Ms. Wannamaker is indicative of the fact that their testimony would have confirmed the parties' contractual intentions as explained by Ms. Roark Peters. The arbitral panel found as a fact, that IMS was the procuring cause of the sale of the Jacada product to JBA (R. 51, JA 92). CST does not argue in this appeal that it did not breach the Agreement. CST argues that IMS should not be able to recover its damages.

Whether a damages limitation provision fails of its essential purpose is a question of fact to be submitted to the fact finder.[17] In *Filenet*, the parties had a dispute over an agreement whereby Filenet agreed to design and install a computer imaging system for use by Central On Line Data Systems (COLDS). The jury (not the court) was presented with the question whether the limitation of damages provision failed of its essential purpose. The arbitrators' finding that the limitation provision failed of its essential purpose, is a finding of fact and may not be overturned on review under Section 10 of the FAA.[18]

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17. *See Central On Line Data Systems, Inc. v Filenet Corporation*, United States Court of Appeals for the Sixth Circuit, unpublished decision, August 23, 1996, Docket no. 95-1016/54, Lexis No. 25261; *see also Forster v Navistar International Transportation Corp.*, Michigan Court of Appeals decision, Docket No. 233048 and 234995, August 27, 2002, unpublished, pp. 15 and 17, citing 67A Am. Jur. 2d, Sales, §§ 921-925, pp 325-330. All unpublished decisions are attached to Respondent's Brief filed with the Circuit Court.

18. Note that the contract in *Filenet*, *supra*, like the Agreement between IMS and CST included the purchase of a product and the

(Cont'd)

The Sixth Circuit similarly determined that the question whether a damages limitation provision fails of its essential purpose is a question of fact.[19] Similar to the present action, *St. Luke's Hospital* involved the purchase of a computer system. The contract included a limitation of liability provision, similar to that in the present case, attempting to limit the seller's liability to the price the buyer paid for the license. The District Court for the Eastern District of Michigan determined that the "[r]esolution of the limitation provision's viability under these standards is clearly factual. The duration and complexity of the arbitration proceedings bears that out." *Id.* at 1248.

The Sixth Circuit thereafter concluded as follows:

> *While we agree with the district court that the question of the validity of the limitation provision is a question of fact*, we disagree that from the award as written it is an "inescapable conclusion that the arbitrator" made the necessary factual determination.

St. Luke's, supra at 25, emphasis added. The arbitrator's award did not expressly state that the arbitrator found the limitation of damages provision to have failed of its essential purpose. Rather, the final determination by the arbitrator simply disregarded the limitation provision. The Sixth Circuit Court went on to quote the case of *In re Granite Worsted Mills, Inc.*, 25 N.Y.2d 451, 457, 306 N.Y.S. 2d 934, 255 N.E. 2d 168 (1969), stating as follows:

> There is no doubt that an arbitrator, if he so decides, may indeed refuse to enforce such a damage

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(Cont'd)

performance of a service. Filenet's contract required Filenet to study, design, make specifications, deliver, install, modify, test and maintain the equipment. *Id.* at 3.

19. *St. Luke's Hospital v SMS Computer Systems, Inc.*, unpublished decision, Docket Nos. 92-1205/1206, June 1, 1993, Lexis 13549, reported as table case at 995 F.2d 1067 (6th Cir. 1993); *St. Luke's Hospital v SMS Computer Systems, Inc.*, 785 F. Supp 1243, 1246 (U.S. Dist, E.D. Mich. 1991).

> limitation clause on the ground of unconscionability or on other grounds and today's decision does not in any way limit that power. What is required, however, is that the award indicate that he was in fact deliberately and intentionally exercising that power so that judicial review can proceed without the need for speculation as to what has in fact occurred in the arbitral tribunal.

St. Luke's, *supra* at 27. Consistent with the requirements set forth in the District Court and the Sixth Circuit's decisions in *St. Luke's*, *supra*, the arbitrators in the present action made an express factual determination that the limitation of damages provision failed of its essential purpose and therefore could not be enforced. Further, they thoroughly explained their decision in that regard.

A host of other Michigan cases support the arbitrators' application of the failure of the essential purpose doctrine in this action.[20] So long as a reviewing court can find any line of argument that is legally plausible and supports the award then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as the arbitrators may the award be set aside.[21] There was no

20. In *West Branch Tank & Trailer, Inc. v Searfoss*, unpublished, Doc. No. 194399, March 10, 1998, *see UAW-GM Human Resource Center v KSL Recreation Corporation*, 228 Mich. App. 486, 508; 579 N.W. 2d 411 (1998) (contract for the use of the recreation center for a conference) and *Moore v St. Clair Co.*, 120 Mich. App. 335, 339; 328 N.W. 2d 47 (1982). "A liquidated damages provision is simply an agreement by the parties fixing the amount of damages in case of a breach." *UAW-GM Human Resources*, *supra* at 508, citing *Papo v Aglo Restaurants of San Jose, Inc.*, 149 Mich. App. 285, 294; 386 N.W. 2d 177 (1986). The limiting clause in the subject Agreement attempted to fix any damages against CST to the amount paid by IMS to purchase the product.

21. *Merrill Lynch*, *supra*, at 421; citing *Storer Broadcasting Co. v American Fed'n of Television and Radio Artists*, 600 F.2d 45 (6th Cir. 1979) and *Ainsworth v Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1269 (1993).

misapplication of law or fact. Nevertheless ". . . even a misapplication of well defined and explicit legal principles does not constitute manifest disregard". *Merrill Lynch, supra*, at 421. **CST has pointed to no controlling case law prohibiting application of the failure of the essential purpose doctrine to the present action.** The arbitrators' determination regarding the invalidity of the limitation of liability provision must be upheld.

A federal court reviewing an arbitration award may only set aside the award in the following relevant circumstance:

> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

"Once an arbitration is conducted under a valid arbitration contract, the FAA 'provides the exclusive remedy for challenging acts that taint an arbitration award'."[22] Due to the very strong public policy in favor of enforcing arbitration agreements, courts have "only a limited role in reviewing arbitration awards as authorized under the FAA."[23] The review of an arbitration decision is "one of the narrowest standards of review in all of American Jurisprudence."[24]

As stated by the Sixth Circuit Court of Appeals in *Merrill Lynch v Alberico*, 70 F.3d 418 (6th Cir. 1995):

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22. *Decker v Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 205 F.3d 906, 909 (6th Cir. 2000) (citing *Core v New York Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982)).

23. *Decker, supra* at 910-11 (citing *Federated Department Stores, Inc.*, 894 F.2d at 866; *Moses H. Cone Mem'l Hospital v Mercury Construction Co.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983).

24. *Lattimer-Stevens Co. v United Steelworkers*, 913 F.2d 1166, 1169 (6th Cir. 1990).

> If a court can find *any line of argument that is legally plausible and supports the award* then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside. *Merrill Lynch, supra*, at 421; citing *Storer Broadcasting Co. v American Fed'n of Television and Radio Artists*, 600 F.2d 45 (6th Cir. 1979) and *Ainsworth v Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1269 (1993). (emphasis added).
>
> * * *
>
> *. . . even a misapplication of well defined and explicit legal principles does not constitute manifest disregard. Merrill Lynch, supra*, at 421. (emphasis added).

In order to further:

> "the objective of arbitration, which is to enable parties to resolve disputes promptly and inexpensively, without resort to litigation and often without any requirement that the arbitrators state the rationale behind their decision" . . . [a]n award will not be set aside because of an error on the part of the arbitrators in their interpretation of the law.[25]

As stated by the Sixth Circuit in *Eisenmann Corp. v Sheet Metal Workers Int'l Ass'n Local No. 24*, 323 F.3d 375, 380 (6th Cir. 2003), quoting *Major League Baseball Players Ass'n v Garvey*, 532 U.S. 504, 509 (2001):

> [I]f an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision.

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25. *Flender Corporation v Techna-Quip Company*, 953 F.2d 273 (7th Cir. 1992).

Therefore, this Court may vacate the arbitration award only if no judge or group of judges could conceivably have come to the same conclusions as these three attorney arbitrators with special qualifications in computer technology. CST could not meet this standard and the arbitration award was appropriately enforced under the Convention and Chapter 1 of the FAA.

CONCLUSION AND REQUEST FOR RELIEF

While CST's Petition does a commendable job in painting a picture of judicial confusion in need of this Court's guidance, a review of the law CST cites confirms it is only CST that is confused.

The language of the Convention, the FAA, and the case law interpreting and applying those bodies of law, confirm the district court could have come to no other conclusion but that the arbitration award here in question is NOT domestic and therefore, is enforceable under the Convention and Chapter 1 of the FAA. The district court had subject matter jurisdiction under the FAA as well as diversity jurisdiction under 28 U.S.C. § 1332.

The award of the arbitration panel must be upheld because it is supported by the facts and the law. Specifically, the award draws its essence from the Agreement and is consistent with the parties' intentions and past practice. The District Court properly applied the FAA's standard of review.

For all of these reasons, Respondent, IMS, hereby requests that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM MOTION FOR SUMMARY DISPOSITION OF THE STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND DATED NOVEMBER 28, 2001

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

01-031319-CZ

JACADA (Europe), Ltd., f/k/a CLIENT SERVER TECHNOLOGY (Europe), Ltd., an English company.

Plaintiff,

-vs-

INTERNATIONAL MARKETING STRATEGIES, INC., a Michigan corporation,

Defendant.

MOTION FOR SUMMARY DISPOSITION

PROCEEDINGS had in the above-entitled matter before the HONORABLE DENISE LANGFORD MORRIS (P34884), Circuit Judge, on WEDNESDAY, NOVEMBER 28, 2001.

[12] . . . subject of the dispute? 2) Does the agreement provide for arbitration in the territory of a signatory of the Convention? 3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial? 4) Is a party to the agreement not an American citizen or does the commercial relationship have some reasonable relation with one or more foreign states?

Appendix A

This Court after careful review of the pleadings, exhibits and applicable law finds that Defendant's Motion for Summary Disposition must be denied, because there is no grant of exclusive jurisdiction to the Federal Courts under the Convention and the Convention recognizes that state courts have jurisdiction over actions to vacate awards. However, this Court also finds that the arbitration award is not a domestic award and is subject to the Convention, because all of the answers to the *Ledee* test are affirmative. The arbitral award in this case arises out of a legal relationship, which is commercial in nature and which is not domestic in scope.

Therefore, Defendant is entitled to remove this action to Federal Court pursuant to Section 205.

[13] In conclusion, it is hereby ordered that Defendant International Marketing Strategies' Motion for Summary Disposition pursuant to MCR 2.116(C)(4), (8) and (10) is denied.

I'll sign the appropriate order.

MR. QUICK: Thank you, Your Honor.

* * * *

APPENDIX B — ORDER OF THE STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND DENYING MOTION FOR SUMMARY DISPOSITION DATED DECEMBER 11, 2001

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

JACADA (Europe), Ltd., f/k/a CLIENT SERVER TECHNOLOGY (Europe), Ltd., an English company,

Plaintiff,

and

INTERNATIONAL MARKETING STRATEGIES, INC., a Michigan corporation,

Defendant.

ORDER DENYING MOTION FOR SUMMARY DISPOSITION

At a session of said Court held in the City of Pontiac, County of Oakland, State of Michigan this 11th day of December, 2001.

This matter having been brought before the Court on the Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(4), MCR 2.116(C)(8) and MCR 2.116(C)(10) and the Court having read and reviewed the briefs submitted by both parties in support of, and in opposition to, said motion and the Court having heard brief oral argument on November 28, 2001, and being fully advised in the premises;

Appendix B

NOW THEREFORE, IT IS HEREBY ORDERED that the Defendant's motion is denied for the reasons contained in the opinion of the Court as stated on the record on November 28, 2001; and

JUDGE DENISE LANGFORD MORRIS
Hon. D[illegible]e Langford Morris